No. 83-5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IN RE AIR CRASH DISASTER AT WARSAW, POLAND, ON MARCH 14, 1980, MDL 441

POLSKIE LINIE LOTNICZE (LOT POLISH AIRLINES),

Petitioner,

v.

ANGELA Y. ROBLES, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONER IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Briefs in Opposition[1] are misleading in several respects, misconstrue the nature of the Montreal Agreement and its relationship to the Warsaw Convention and fail to address the point that without the Second Circuit's reliance upon its earlier erroneous interpretation of Arti-

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[1] Separate Briefs have been submitted on behalf of Respondents Robles and Ojeda (filed August 31, 1983) and on behalf of Respondents Smiegel, Pimental, Bland, Wesson, Chavis, Radison and Lindsay (filed August 3, 1983). Their Briefs are hereinafter referred to as the Robles Brief and the Smiegel Brief, respectively. They are collectively referred to as Respondents in this Reply Brief.

cle 3(2) of the Warsaw Convention in *Lisi*,[2] the decision of the court below has no foundation in law, fact or history.

In apparent recognition of its lack of authority, Respondents make no attempt to support or uphold the decision by the Second Circuit in *Lisi*, which has been rejected by the Canadian Supreme Court in *Ludecke*[3] and respected commentators on international air law. Rather, Respondents rely completely[4] upon the provisions of the Montreal Agreement to support the holding below.

> The applicability of and the lower court's reliance upon the Montreal Agreement distinguishes this from the *Lisi* and *Ludecke* cases which were concerned solely with an interpretation of the Warsaw Convention.

Smiegel Brief at 13; see Robles Brief at 8-9. The Montreal Agreement does not have any provision for a sanction for non-compliance with its provisions and cannot, therefore, provide any basis for distinguishing the erroneous holding below from the erroneous holding in *Lisi*.

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[2] *Lisi* v. *Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508 (2d Cir. 1966), *affirmed by an equally divided court*, 390 U.S. 455 (1968).

[3] *Ludecke* v. *Canadian Pacific Airlines*, 98 D.L.R. 3d 52 (Can. 1979).

[4] A 10 point type requirement, similar to that of the Montreal Agreement, found in CAB regulations, 14 C.F.R. §221.175, is also cited by Respondents. Smiegel Brief at 13; Robles Brief at 2, 5, 10. It clearly was not a codification of the requirements for the Warsaw Convention "statement". Memorandum for the CAB as Amicus Curiae at 8, *Alitalia-Linee Aeree Italiane, S.p.A.* v. *Lisi*, 390 U.S. 455 ("the Board did not profess to be codifying or in any way determining what size type may be required by the Warsaw Convention"). Moreover, the CAB regulation contains no support for Respondents' position. A carrier failing to comply with that regulation may be subject to a civil penalty, 49 U.S.C. §1471, but there is no provision in any law or regulation which authorized the court below to impose the sanction of absolute and unlimited liability without fault for compensatory wrongful death

A simple chart of the relevant instruments, circumstances and sanctions graphically illustrates the error of Respondents and the court below.

Instrument	*Circumstance for Sanction*	*Sanction*
Warsaw Convention	failure to deliver ticket (Article 3(2)), untimely delivery of ticket (*Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965)), inadequate "statement" of limitation (*Lisi; contra, Ludecke*).	the carrier cannot exclude or limit liability (Article 3(2))
Hague Protocol	failure to deliver ticket (Article 3(2)), failure to include specified "notice" (Article 3(2))	cannot limit liability (Article 3(2))
Montreal Agreement	none specified	none specified

The Respondents argue for, and the court below has imposed, the Warsaw Convention sanction for a mere technical and insubstantial failure by LOT to comply with the print-size requirements of the Montreal Agreement which does not specify any circumstance for a sanction or indeed for any sanction for non-compliance in any respect. Relying upon *Lisi*, the court below interpreted the private inter-carrier Montreal Agreement as if it had amended the Warsaw Convention treaty in the manner actually accomplished by the Hague Protocol, which never was ratified by the United States.[5]

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damages for failure to comply with the regulation's print size requirement.

Respondents' reference to Petitioner Polskie Linie Lotnicze's (hereinafter LOT) foreign air carrier permit is also inapposite and misleading. Smiegel Brief at 11. The permit only requires LOT to deposit a signed counterpart to the Montreal Agreement with the CAB. Smiegel App. at 3a. LOT did so. Petitioner's App. at 63a-67a (hereinafter Pet. App.).

[5] Had a sanction for non-compliance been provided for in the Montreal Agreement the result would, of course, be different. See

In a veiled attempt to divorce the holding below from the erroneous *Lisi* decision, Respondents also claim that reconsideration of *Lisi* would have no effect in this case.[6]

Montreal Trust Co. v. *Canadian Pacific Airlines*, 72 D.L.R.3d 257 (Can. 1976), Smiegel App. 10a-23a. The Canadian Supreme Court in *Montreal Trust* construed the language of Article 3 as amended by the Hague Protocol (Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October, 1929, September 28, 1955. 478 U.N.T.S. 371 (herein Hague Protocol)), which never was ratified by the United States. The Hague Protocol amended Article 3 to require a "notice", the absence of which resulted in imposition of a sanction. The Supreme Court of Canada recognized the important difference between the unamended (Warsaw Convention) and amended (Hague Protocol) versions of Article 3.

> In relation to a claim for loss of life, art 3(1) of the Convention, as I have said, merely required "a statement" and furthermore under that article the absence of that "statement" did not preclude the carrier from limiting its liability provided that the ticket was "delivered". The amended article as contained in the Protocol not only requires a "notice" but the absence of such "notice" denies the carrier the benefit of art. 22. The "notice" required by the Protocol and the statement required by the Convention are therefore two completely different requirements with radically different effects. . . .

72 D.L.R.3d at 263, Smiegel App. at 22a. Although the "notice" requirement of the Hague Protocol, which is not normally applicable in the United States, may be similar to the more detailed notice requirement of the Montreal Agreement, Respondents blatantly ignore the fact that the Hague Protocol provides its own sanction for failure to supply the appropriate notice whereas the Montreal Agreement does not specify any sanction at all for failure to comply with its provisions. Moreover, the court below itself ignored that distinction. Instead, it interpreted Article 3 of the Warsaw Convention in conjunction with the Montreal Agreement as if the United States had ratified the Hague Protocol. Adoption of the Montreal Agreement between airlines cannot be construed or interpreted as a substitute amendment of the Warsaw Convention in light of the United States' failure to ratify the Hague Protocol. The Montreal Agreement, therefore, did not provide any basis to the court below for imposing the sanction of absolute and unlimited liability without fault.

[6] Respondents also claim the questions presented are not ripe for review because the Montreal Agreement has effectively mooted the Second Circuit's erroneous *Lisi* decision and its conflict with the Canadian Supreme Court's decision in *Ludecke*. Smiegel Brief at

Smiegel Brief at 17. That claim is wrong because it is clear that Respondents and the opinion below mistakenly intermingle the "notice" specifications of the Montreal Agreement with the requirement for ticket delivery in Article 3(2) of the Warsaw Convention, while ignoring the fact that the private inter-carrier Montreal Agreement could not amend in any way Article 3 of the Warsaw Convention treaty. The Second Circuit's implied and erroneous holding[7] that the Montreal Agreement amended the Warsaw Convention and its reliance on the discredited holding of *Lisi* is apparent. The Second Circuit said below:

> The Agreement supplements the Convention in particular respects, but Article 3(2) still imposes on carriers the duty to inform passengers of liability limitations. The failure to do so, as measured either by the terms of Article 3 or the Montreal Agreement, results in forfeiture of the limitation.

705 F.2d at 90, Pet. App. at 13a. The overruling of *Lisi* would remove the only tenuous strand that arguably supports the holding below.

15-16. Relying upon *Lisi*, other courts in the United States have expressed doubt that even the Montreal Agreement notice requirement is sufficient for the Warsaw Convention. *In Re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1313 n. (9th Cir. 1982). Any such future holding by the Ninth Circuit would clearly result in a conflict with the decisions of the Second Circuit here and the District of Columbia Circuit in *Deutsche Lufthansa Aktiengesellschaft* v. *CAB*, 379 F.2d 912 (D.C. Cir. 1973), and result in further uncertainty in an area of the law which is intended to be uniform throughout the world. Because of the extreme dislike for limitations of liability, there will be continual litigation in United States courts over what is sufficient to comply with the judicially required "notice" of the limitation of liability in the Warsaw Convention until this Court settles the issue finally. The issue clearly was not settled by *Lisi*.

[7] The implied holding that a private agreement can amend a treaty of the United States standing alone would be sufficient to warrant review by the Court.

Moreover, the Second Circuit apparently concluded that the type-size requirement for the Advice to International Passengers on Limitation of Liability (herein Montreal Advice) in the Montreal Agreement was some sort of codification or standard for the Warsaw Convention "statement" to be measured against.[8] *Id.* That conclusion and Respondents' argument based upon it evolve from a fundamental misconception as to what constitutes the "statement" on the passenger ticket required by the Warsaw Convention.

In conjunction with their attempts to attain uniformity in the area of transportation documentation, the members of the International Air Transport Association (herein IATA) have adopted a Resolution[9] that specifies the type size for the "statement" required by Article 3 of the Warsaw Convention and for the "notice" required by Article 3 of the Warsaw Convention as amended by the Hague Protocol. Pursuant to that Resolution, the "statement" required by Article 3 of the Warsaw Convention is included in paragraph 2 of the Conditions of Contract on the passenger ticket and is required to be printed in 6 point type in a print which is bolder type than the other paragraphs of the Conditions of Contract. IATA Resolution 724(1), Reply App. 1a-2a. The "notice" required by Article 3 as amended by the Hague Protocol is required to be printed in bold letters of 8 point type size. IATA Resolution 724(1)(a), Reply App. 1a.

Because the language of Article 3 of the Warsaw Convention is different from the amended language in the

[8] Respondents also argue to that effect. Robles Brief at 6-7, 10.

[9] IATA Resolution 724, Reply App. 1a-4a. There are IATA resolutions and recommendations on varied subjects involving international aviation. Although adopted by airlines, before becoming effective they are approved by governments. Several governments rely upon IATA to develop the uniformity of documentation necessary for international air transportation.

Hague Protocol,[10] the Warsaw Convention requirement for a "statement" is separate and distinct from the "notice" requirement of the Hague Protocol[11] and, therefore, both a "statement" and "notice" are required to be on IATA's approved uniform passenger ticket. See Reply App. 1a-4a. The Montreal Advice is also considered to be separate and independent of the Warsaw Convention "statement" and the Hague Protocol "notice" and the Montreal Advice is also printed separately with respect to tickets having an origin, destination or stopping place in the United States. Pet. App. 113a.

The Hague Protocol "notice" on the LOT passenger ticket complied with the print-size requirements of IATA Resolution 724. Reply App. 5a. The "statement" required by Article 3 of the Warsaw Convention and included in paragraph 2 of the LOT passenger ticket Conditions of Contract also complied with the print requirements of IATA Resolution 724. See IATA App. 5a. Although the LOT ticket complied in all material respects with the uniform print size requirements adopted by IATA for the "statement" required by Article 3 of the Warsaw Convention, the Second Circuit has inserted the separate and independent print size requirement for the Montreal Advice into the Warsaw Convention and, at the stroke of a pen, destroyed the uniformity which otherwise prevails throughout the world.

The court below failed to distinguish the Montreal Advice's requirements from the Warsaw Convention "statement" requirements. That initial failure precipitated a further failure by the court below to distinguish between the Warsaw Convention treaty sanction and one arising

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[10] See Petition at 20, n.27.

[11] *Accord, Montreal Trust Co.* v. *Canadian Pacific Airlines*, 72 D.L.R.3d 257 (Can. 1976), Smiegel App. 10a-23a.

from the Montreal Agreement.[12] The imposition of a treaty sanction upon LOT for failure to comply with the Montreal Advice print size requirements is illogical and has no legal foundation. LOT complied with Article 3 of the Warsaw Convention and the international uniform print requirements established by IATA for the Warsaw "statement". The Montreal Agreement does not amend in any way Article 3 of the Warsaw Convention and, consequently, by imposing a treaty sanction contained in Article 3 of the Warsaw Convention for a mere technical and insubstantial failure to comply with the Montreal Agreement, the court below has interjected an element of extreme uncertainty as to what will constitute compliance with Article 3 of the Warsaw Convention. *Cf. In Re Aircrash in Bali, Indonesia on April 22, 1974,* 684 F.2d 1301, 1313 n.13 ("We need not decide here whether the notice required by the CAB is adequate to advise a passenger of the effect of the limitation.").

CONCLUSION

The entire rationale of the decision below flows from the clearly erroneous interpretation of Article 3, espoused in *Lisi,* that a failure to give "notice" of the applicability of the liability limitation of the Warsaw Convention results in imposition of the sanction of absolute and unlimited liability for damages without fault. The transposition of the Warsaw Convention treaty sanction, as interpreted in *Lisi,* for a technical violation of the private inter-carrier Montreal Agreement, as if it were an amendment to the treaty, is the critical question that the Court should review to determine whether this is correct treaty interpretation and application. Respondents' protestations to the contrary are

[12] See 49 U.S.C. §1471 (1976).

absolutely incorrect and their attempt at having the Court avoid the substantial and important questions with respect to treaty interpretation raised by the Petition and decision below should be rejected by the Court.

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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Dated: September 22, 1983

Certificate of Service

I hereby certify that I have, this 22nd day of September, 1983 served the foregoing Reply Brief of Petitioner in support of the petition for a writ of certiorari upon respondents by depositing same in a United States mail box at 1251 Avenue of the Americas, New York, New York 10020 with first class postage prepaid, addressed to Speiser & Krause and Kreindler & Kreindler, counsel of record for respondents, at their respective post office addresses, 200 Park Avenue, New York, New York 10017 and 99 Park Avenue, New York, New York 10016.

September 22,1983

/s/ George N. Tompkins, Jr.
George N. Tompkins, Jr.
Counsel for Petitioner

APPENDIX

IATA Resolution 724

PASSENGER TICKET—CONDITIONS OF CONTRACT

PSC1(01)724 Expiry: Indefinite
PSC2(01)724
PSC3(01)724 Type: A

RESOLVED that,

(1) the 'Notice' and the 'Conditions of Contract' on the Passenger Ticket and Baggage Check used for interline international carriage read as shown in Paragraph (2) below:

(a) the text of the Notice shall be printed in bold letters, eight point size, preferably in Helvetica or similar large character letters and the text of the Conditions of Contract in six point size of the same character;

(b) Paragraph 2 of the text of the Conditions of Contract shall be printed in bolder type than the other paragraphs thereof.

(2) the titles and text of the Notice and Conditions of Contract are:

NOTICE

If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage. See also notice headed 'Advice to International Passengers on Limitation of Liability'.

IATA Resolution 724

CONDITIONS OF CONTRACT

1. As used in this contract 'ticket' means this passenger ticket and baggage check, of which these conditions and the notices form part, 'carriage' is equivalent to 'transportation', 'carrier' means all air carriers that carry or undertake to carry the passenger or his baggage hereunder or perform any other service incidental to such air carriage. 'WARSAW CONVENTION' means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

2. Carriage hereunder is subject to the rules and limitations relating to liability established by the Warsaw Convention unless such carriage is not 'international carriage' as defined by that Convention.

3. To the extent not in conflict with the foregong carriage and other services performed by each carrier are subject to:

   (i) provisions contained in this ticket,

   (ii) applicable tariffs,

   (iii) carrier's conditions of carriage and related regulations which are made part hereof (and are available on application at the offices of carrier), except in transportation between a place in the United States or Canada and any place outside thereof to which tariffs in force in those countries apply.

IATA Resolution 724

4. Carrier's name may be abbreviated in the ticket, the full name and its abbreviation being set forth in carrier's tariffs conditions of carriage, regulations or timetables; carrier's address shall be the airport of departure shown opposite the first abbreviation of carrier's name in the ticket; the agreed stopping places are those places set forth in this ticket or as shown in carrier's timetables as scheduled stopping places on the passenger's route; carriage to be performed hereunder by several successive carriers is regarded as a single operation.

5. An air carrier issuing a ticket for carriage over the lines of another air carrier does so only as its Agent.

6. Any exclusion or limitation of liability of carrier shall apply to and be for the benefit of agents, servants and representatives of carrier and any person whose aircraft is used by carrier for carriage and its agents, servants and representatives.

7. Checked baggage will be delivered to bearer of the baggage check. In case of damage to baggage moving in international transportation complaint must be made in writing to carrier forthwith after discovery of damage and, at the latest, within seven days from receipt; in case of delay, complaint must be made within 21 days from date the baggage was delivered. See tariffs of conditions of carriage regarding non-international transportation.

8. This ticket is good for carriage for one year from date of issue, except as otherwise provided in this ticket, in carrier's tariffs, conditions of carriage, or related regulations. The fare for carriage hereunder is subject to change prior to commencement of car-

IATA Resolution 724

riage. Carrier may refuse transportation if the applicable fare has not been paid.

9. Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch. Times shown in timetables or elsewhere are not guaranteed and form no part of this contract. Carrier may without notice substitute alternate carriers or aircraft, and may alter or omit stopping places shown on the ticket in case of necessity. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections.

10. Passenger shall comply with Government travel requirements, present exit, entry and other required documents and arrive at airport by time fixed by carrier or, if no time is fixed, early enough to complete departure procedures.

11. No agent, servant or representative of carrier has authority to alter, modify or waive any provision of this contract.

The following is an actual size reproduction of the Hague Protocol Notice and the Warsaw Convention Statement as contained in the LOT passenger ticket of plaintiffs' decedents.

NOTICE

If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage. See also notice headed "Advice to International Passengers on Limitation of Liability".

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2. **Carriage hereunder is subject to the rules and limitations relating to liability established by the Warsaw Convention unless such carriage is not "international carriage" as defined by that Convention.**

3. To the extent not in conflict with the foregoing carriage and other services performed by each carrier are subject to: (I) provisions contained in this ticket, (II) applicable tariffs, (III) carrier's conditions of carriage and related regulations which are made part hereof (and are available on application at the offices of carrier), except in transportation between a place in the United States or Canada and any place outside thereof to which tariffs in force in those countries apply.

4. Carrier's name may be abbreviated in the ticket the full name and its abbreviation being set forth in carrier's tariffs, conditions of carriage, regulations or timetables; carrier's address shall be the airport of departure shown opposite the first abbreviation of carrier's name in the ticket; the agreed stopping places are those places set forth in this ticket or as shown in carrier's timetables as scheduled stopping places on the passenger's route; carriage to be performed hereunder by several successive carriers is regarded as a single operation.

5. An air carrier issuing a ticket for carriage over the lines of another air carrier does so only as its agent.

6. Any exclusion or limitation of liability of carrier shall apply to and be for the benefit of agents, servants and representatives of carrier and any person whose aircraft is used by carrier for carriage and its agents, servants and representatives.

7. Checked baggage will be delivered to bearer of the baggage check. In case of damage to baggage moving in international transportation complaint must be made in writing to carrier forthwith after discovery of damage and, at the latest, within 7 days from receipt; in case of delay, complaint must be made within 21 days from date the baggage was delivered. See tariffs or conditions of carriage regarding non-international transportation.

8. This ticket is good for carriage for one year from date of issue, except as otherwise provided in this ticket, in carrier's tariffs, conditions of carriage, or related regulations. The fare for carriage hereunder is subject to change prior to commencement of carriage. Carrier may refuse transportation if the applicable fare has not been paid.

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